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Supreme Court, U.S.
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No. 02-1866

IN THE

Supreme Court of the United States

KEITH SHWAYDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in defending standards of professional advocacy and upholding the constitutional commitment to the effective assistance of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000).

SUMMARY OF ARGUMENT

1. The duties of loyalty and confidentiality are the backbone of the lawyer-client relationship. When they are compromised, a defendant is left without a single-minded advocate of his own, and there can be no assurance that the prosecution's case has been subjected to the "meaningful adversarial testing" required by the Sixth Amendment. *See United States v. Cronic*, 466 U.S. 648, 656 (1984). This is a case in

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

point. Petitioner Keith Shwayder was saddled with a lawyer whose conflicting duties precluded him from pursuing the strategy best for his client, depriving Shwayder of the zealous advocacy to which he was entitled.

2. As this Court has recognized, identifying the precise effect of a breach of the duty of loyalty on the outcome of a trial is difficult or impossible. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). Accordingly, the Court has established a prophylactic rule that presumes prejudice when an actual conflict of interest is established. *Id.*; *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). The lower courts, however, have failed to reach consensus on how that standard is to be applied. And as a practical matter, a rule intended to relieve defendants of the burden of proving prejudice has become, at least in some circuit courts, indistinguishable from – or even more demanding than – the prejudice inquiry undertaken in standard ineffective assistance cases. The confusion in the lower courts has led to results that cannot be reconciled with this Court's case law, and warrants the Court's immediate review.

ARGUMENT

Keith Shwayder relied on his attorney, John Schlie, to devote his full energies to Shwayder's defense, unconstrained by competing interests. Schlie betrayed that trust, and in so doing, deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

I. SCHLIE'S CONFLICT OF INTEREST WAS ACTUAL AND APPARENT FROM THE OUTSET.

The basic facts of this case are straightforward and egregious. Petitioner had a brief but ill-fated business relationship with Michael Swan during which Swan used him to advance his own interests. Petitioner was a successful businessman who had owned Teletek, a NASDAQ-listed company, for over ten years when he met Swan. Swan, on the

other hand, was engaged in a nationwide bribery scheme, paying stockbrokers around the country to sell stock in his company, United Payphone, to their clients in order to inflate stock prices. In order to raise additional money for his company, Swan wanted to obtain a NASDAQ listing by merging with a listed company. He approached petitioner – who he had not met before – and proposed a merger between their companies for the sole purpose of obtaining that listing. Swan never told Shwayder, either before or after the merger, about his bribery scheme.

Following the merger, Swan replaced Shwayder as chief executive officer and chairman of the board of directors of Teletek, and assumed nearly complete control of the company's operations. Having accomplished his purpose, Swan no longer had any use for Shwayder, and Shwayder resigned from Teletek eight months after the merger.

Eventually, Swan's activities came to the attention of the grand jury in Las Vegas. Attorney John Schlie represented Swan during an eight-month period in which he was under investigation by the grand jury. That investigation ultimately led to charges against both Swan and petitioner. The best defense for petitioner, who knew nothing about Swan's wrongdoing, was plainly to point the finger of blame at Swan. Nevertheless, Schlie, despite his representation of Swan, agreed to represent petitioner in defending against the government's charges. And notwithstanding the obvious competing interests involved, Schlie entered a joint defense agreement with Swan's new counsel.

It was evident from the outset that Schlie's representation of petitioner, after previously representing his co-defendant in the pre-indictment phase of the same proceeding, constituted a prohibited conflict of interest. The conflict was only exacerbated when, midway through trial, Swan pled guilty and testified against petitioner. Schlie now had to cross-examine and challenge the veracity of his own former client.

At no time did Schlie notify the court of his prior representation of Swan.

The conflicts of interest that permeated Schlie's representation of petitioner were not speculative or subtle. To the contrary, they were actual, obvious and avoidable from the outset. Nevertheless, the Court of Appeals found that there had been no violation of petitioner's Sixth Amendment right to conflict-free representation. It did so in reliance on a minority test that is inconsistent with this Court's precedents and out-of-step with the standards being employed by most other courts. The gravity of the ethical violations in this case and the disagreement in the lower courts merit this Court's attention.[2]

II. SCHLIE'S REPRESENTATION OF PETITIONER VIOLATED THE FUNDAMENTAL ETHICAL DUTIES OF LOYALTY AND CONFIDENTIALITY.

During the course of his representation of petitioner, Schlie violated at least two distinct ethical duties owed his clients: the duty of loyalty and the duty of confidentiality. These are not overly-detailed or obscure ethical canons. Rather, the duties of loyalty and confidentiality are among the most fundamental of professional norms, widely held and well understood. Schlie's failure to honor them here means that there can be no confidence that counsel "fulfill[ed] the role in the adversary process that the [Sixth] Amendment

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[2] Because this case arises on direct appeal, it provides what may be a rare opportunity to address the important Sixth Amendment question presented. Most ineffective assistance of counsel claims arise on habeas review. *See generally Massaro v. United States*, 123 S. Ct. 1690 (2003). As a result, they often are decided not on the merits of the issue, but rather on a finding that the state court decision was not "contrary to, or [did not] involve[] an unreasonable application of, clearly established Federal law" under the Anti-Terrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d)(1). This direct appeal thus presents an especially good vehicle for reaching the merits of the question presented.

envisions." *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

The Model Rules of Professional Conduct ("Model Rules") establish the duties of loyalty and confidentiality as the primary ethical duties owed by a criminal defense lawyer to a client.[3] Because they have been adopted by the United States District Court for the District of Nevada, the Model Rules governed Schlie's conduct in this case. *See* D. Nev. L.R. IA 10-7; Nev. Sup. Ct. R. 150. And that is not some peculiarity of which Schlie might have been unaware. The Model Rules govern the conduct of most attorneys, having been widely adopted in both state and federal courts. They constitute, in whole or in part, the official ethical code of 42 states– including the state of Colorado, where Schlie resides and practices. *See Law.'s Man. Of Prof'l Conduct (ABA/BNA)* at 01:3-01:8 (2003). And because the United States District Courts typically apply the ethical rules of the states in which they sit, the Model Rules have also become the primary authority for analyzing conflict of interest cases in the federal system. Linda A. Winslow, Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 Wash. L. Rev. 863, 863 n.5 (1987).

This Court has recognized, as recently as last term, that "'[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable'" under the Sixth Amendment.

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[3] The Model Rules are promulgated by the American Bar Association and, as such, are the legal profession's own expression of its ethical standards. This brief discusses the version of the Model Rules in effect during Schlie's representation of petitioner. The Rules were amended in August 2002 in ways that either do not affect this case or make even clearer Schlie's dereliction of duty. *See* Model Rules of Prof'l Conduct R. 1.7 (2002) ("Model R.") (specifically including duties to former clients within the scope of potential competing interests).

Wiggins v. Smith, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 466 U.S. at 688-89). In evaluating Sixth Amendment claims of ineffective assistance, the Court has declined to establish on its own a set of "specific guidelines" for attorney performance. *Id.* at 2535; *Strickland*, 466 U.S. at 688. Instead, it has deferred in large measure to the expertise of the legal profession itself, "emphasiz[ing] that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins*, 123 S. Ct. at 2535 (quoting *Strickland*, 466 U.S. at 688); *see also Nix v. Whiteside*, 475 U.S. 157, 166-67 (1986) (scrutinizing ABA Model Code and Model Rules in course of Sixth Amendment analysis). That is not to say that professional standards necessarily and in all cases are dispositive of the Sixth Amendment question. *See Strickland*, 466 U.S. at 688. But this Court consistently and very sensibly has treated prevailing norms of practice, as reflected in the Model Rules, as the best guide to what constitutes "effective assistance of counsel" under the Sixth Amendment. *See id.* (Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the presumption that counsel will fulfill the role in the adversary process that the Amendment envisions").

In this case, Schlie's prior defense of Swan, in the pre-indictment phase of the proceeding in which he represented petitioner, placed the ongoing duties of loyalty and confidentiality he owed to Swan as his former client in direct conflict with the duty of loyalty he owed petitioner as his current client. The Court of Appeals agreed, holding that "there was an actual conflict of interest," but failed to appreciate the necessary – and in this case, obvious – consequences of that conflict. Schlie's representation of petitioner violated fundamental ethical duties and deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

A. Schlie Violated Separate Duties Of Loyalty To His Former And Current Clients.

1. The duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692; *see also* Charles W. Wolfram, *Modern Legal Ethics* 316 (1986) (duty of loyalty to a client is "a basic tenet of the Anglo-American conception of the lawyer-client relationship"). The Sixth Amendment guarantees the effective assistance of counsel because only effective counsel can assure that a trial becomes a "reliable adversarial testing process," *Strickland*, 466 U.S. at 688, "relied on as having produced a just result," *id.* at 686. In order to fulfill that role, counsel must commit his undivided attention to providing the defendant with the fullest possible defense, uncorrupted by competing loyalties. *See id.* at 688 ("counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest"). That did not happen here.

The duty of loyalty comprises two separate obligations – one to former clients and the other to current clients. Model Rule 1.9(a) expressly protects the rights of former clients, providing that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." [4] Thus, an attorney owes a former client a duty to avoid at the outset a representation that would be adverse to her interests, and a current client a continuing "duty to zealously advocate on her behalf, unhampered by any competing

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[4] Although the Court of Appeals did not address Swan's alleged waiver, it invalidated petitioner's waiver on grounds that would apply equally to Swan. *See* Pet. App. 11a-12a ("The waiver document stated that there was no conflict of interest, so it can hardly be read as waiving one. Also, the document was signed before the indictment was issued and a few years before trial, so it could not have taken into account the actual scope of the case as it proceeded.").

commitments to other clients." *Perillo v. Johnson*, 205 F.3d 775, 801 (5th Cir. 2000).

The rights of current clients are covered by Model Rule 1.7(b), which states that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . ." This rule ensures that an attorney is in a position to "vigorously assert" a current client's interests, without any impairment of her commitment as a result of conflicting interests. Wolfram, *supra*, at 317. The comments specifically caution that "[l]oyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Model R. 1.7(b), cmt. 4 (1983).

Together, these restrictions are meant to ensure that every criminal defendant has his own champion, one single-mindedly dedicated to his best interests. In this case, Schlie's failure to faithfully observe his ethical duties meant that petitioner was deprived of counsel free to offer undivided and thus effective assistance.

2. Schlie's first ethical violation came at the moment he accepted petitioner's representation. As described above, Schlie owed a continuing duty of loyalty to his former client, Swan. That duty clearly extended to the post-indictment phase of the same proceeding in which he had represented Swan pre-indictment. *See* Model R. 1.9(a) (1983) (ethical bar covers representation "in the same or a substantially related" proceeding). Thus, by virtue of his former representation, Schlie was under a continuing obligation to avoid any course of action that would undermine *Swan*'s interests. There was no way to reconcile that obligation with petitioner's interest – which was to point the finger of blame at Swan.

In short, Schlie was ethically precluded from agreeing to represent petitioner in the first place. When heeded, Model Rule 1.9(a) – like similar conflict-of-interest norms – operates preemptively to avoid situations in which counsel's performance is hobbled by divided loyalties. Because Schlie chose to disregard Rule 1.9(a), that is exactly what happened here.

3. Schlie's second ethical breach was the violation of his duty of loyalty to his current client, petitioner. From the beginning, Schlie's prior representation of Swan sabotaged his ability to provide petitioner with effective legal assistance. Schlie was unable to make judgments based on objective and dispassionate strategy. Instead, he was required to tailor his defense of petitioner to meet his ongoing duty of loyalty to Swan. That constraint crippled Schlie's pretrial investigation, restricted the defense strategies available to him, and constrained his advocacy of petitioner's innocence.

The effect of this conflict was most apparent in Schlie's failure to adopt a blame-shifting strategy. As the court below conceded, petitioner "had an interest" in pursuing that strategy "[f]rom the beginning." Pet. App. 13a. But in combination with the duty owed to Swan, that interest rendered an actual conflict completely unavoidable. Indeed, it is "difficult to envision circumstances more fraught with inherent conflict than where an [attorney] must present a defense theory inculpating the attorney's former client, particularly where the former representation was factually intertwined with the criminal defendant's case." *Church v. Sullivan*, 942 F.2d 1501, 1511 (10th Cir. 1991).

It was obvious from the start that painting Swan as the blameworthy party was petitioner's best option. Swan's involvement in the illegal activities began long before Swan met petitioner, and continued long after he had run him out of the company. On the other hand, petitioner's business relationship with Swan lasted only a matter of months, and

petitioner was largely excluded from the business operations of the company. Nor did petitioner have any personal relationship with Swan, either before the merger or after his resignation from Teletek. By contrast, Shwayder's co-defendants included Swan's wife and his close friend and business associate. Against that background, the only sensible option for petitioner was to argue that the blame lay with Swan and those close to him – a category that did not include petitioner.[5] But instead of cutting Swan loose, Schlie entered a joint defense agreement with him. Instead of inculpating Swan to save his current client, Schlie never even hinted during his opening statement or the first half of trial that Swan had done anything wrong. Even after Swan pled guilty and provided damaging testimony against petitioner, Schlie mustered only a half-hearted attempt to shift the blame to him. He failed to vigorously attack Swan on cross-examination, and never accused him of lying under oath in order to win a reduced sentence. Nor did he attack Swan's credibility as a witness in his closing argument, once again failing to argue to the jury that Swan lied to them from the witness stand. Petitioner was left vulnerable to unchallenged attacks by the person his attorney should have pursued from the beginning.

This Court has recognized the difficulty in measuring the precise effect on strategy and performance when counsel labors under a conflict of interest. *See Strickland*, 466 U.S. at 692. *Amicus* agrees that such an effect is usually difficult to pinpoint. But this is the unusual case in which the effect is both obvious and obviously devastating. Schlie's conflicting interests left petitioner unprotected by a zealous advocate and without the benefit of his Sixth Amendment right to unconflicted counsel.

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[5] In fact, Swan's wife and another co-defendant were admitting their complicity and pleading guilty, even before the trial began. These guilty pleas render inconceivable the notion that Schlie did not anticipate the guilty plea by Swan that put counsel in the untenable position of cross-examining his own former client.

B. Schlie's Representation Of Petitioner Was Also Hindered By His Ongoing Duty Of Confidentiality To Swan.

Schlie owed his former client a continuing duty of confidentiality as well as one of loyalty. The duty of confidentiality prohibits an attorney from revealing, except in very limited circumstances, any "information relating to representation of a client unless the client consents after consultation...." Model R. 1.6(a) (1983). With respect to a former client, counsel may not "(1) use information relating to the representation to the disadvantage of the former client . . . or (2) reveal information relating to the representation . . . ." *Id.*, Model R. 1.9(c). That broad prohibition "extends to all confidential information, whether privileged or unprivileged, and whether learned directly from the client or from another source." *Perillo*, 205 F.3d at 799. And the duty of confidentiality is effectively permanent, continuing beyond the time of the representation and even beyond the client's death. *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998).

Like the ongoing duty of loyalty, the ongoing duty of confidentiality owed Swan prevented Schlie from presenting a full defense on behalf of petitioner. The most salient effect of this conflict, however, was on Schlie's cross-examination of his former client. That is no surprise. Courts have specifically recognized the inherent risk that an attorney "may fail to conduct a rigorous cross-examination for fear of misusing . . . confidential information" if the witness the attorney faces is a former client. *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (citing *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982)). "The potential for conflicting interests is particularly acute when, as here, the two clients are, or were, codefendants who allege different levels of culpability in the crime." *Id.* It is that functional concern – that a lawyer may be prevented from pursuing an effective cross-examination of a former client, to the

detriment of a current client – that lies behind ethical rules barring attorneys from conducting such cross-examinations. *See Wheat v. United States*, 486 U.S. 153, 164 (1988) (noting that attorney who previously represented witness in same or substantially related matter may not ethically cross-examine witness).

Schlie's conflicting duties to Swan and petitioner help to explain his lackluster cross-examination of Swan. Perhaps most important, they prevented Schlie from eliciting the fact that Swan lied to Schlie repeatedly about the bribery scheme during the course of the former representation. Such an admission – that Swan had lied to the person whose sole job was to defend his interests – would have emphasized the likelihood that he had lied to Shwayder as well, and underscored his lack of credibility to the jury. But the duty of confidentiality he owed to Swan precluded Schlie from even raising the subject.

Conflicts related to the duty of confidentiality are especially hard to detect and evaluate. The current client has no way of knowing what confidences were shared during a prior representation, and how those confidences may have negatively affected his attorney's representation of him. Thus, the district court in this case had only Schlie's word that he was not privy, by virtue of his former representation of Swan, to any confidential information that was not available from other sources. But only Schlie and his former client could know if that is true, and neither had an interest in assisting petitioner in pursuing his ineffective assistance claim.

Counsel in this case failed all relevant ethical benchmarks, leaving petitioner unable to mount the strongest defense available and thus without the effective assistance of counsel guaranteed by the Sixth Amendment. The Model Rules operate – when adhered to – to prevent precisely the kind of actual conflicts of interest that violate the Sixth Amendment. Because those Rules were not followed here,

counsel was unable to act as a zealous advocate on petitioner's behalf and could not play his "crucial role" in ensuring that the prosecution's case was put to a meaningful adversarial test. *Strickland*, 466 U.S. at 685.

III. THE COURT SHOULD REAFFIRM THAT *SULLIVAN*'S "ADVERSE EFFECT" STANDARD DOES NOT REQUIRE A SHOWING OF PREJUDICE.

1. This Court has long recognized that allegations of ineffective assistance of counsel premised on conflicts of interest raise distinct concerns under the Sixth Amendment and are thus subject to a distinct standard. General ineffective assistance claims are evaluated under *Strickland*'s familiar two-part test, requiring a claimant to show both that counsel's performance was deficient and that the deficiency prejudiced the defense. 466 U.S. at 687. But in *Holloway* and *Sullivan*, the Court established a separate rule for conflict of interest claims. Because undivided loyalty is so important, and because the effects of a breach of the duty of loyalty are so hard to identify, the inquiry is different. Where there is an actual conflict – defined in *Sullivan* as one that produces an "adverse effect" on counsel's performance – prejudice is presumed. 446 U.S. at 349.

This prophylactic safeguard is both eminently sensible and critically important. As the Court has repeatedly recognized, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692; *see also Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) ("to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible"). The problem is that a conflict of interest rarely makes itself felt in something an attorney *does* at trial, the effect of which might be gauged from the record. Instead, a conflict is far more likely to manifest itself in something an attorney *fails* to do – so that a reviewing court must first hypothesize what the at-

torney might have done and then identify the possible effect of that (purely conceptual) action on the defense. *See Holloway*, 435 U.S. at 490-91; *see also Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991) ("the dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'") (quoting *Holloway*, 435 U.S. at 489). In *Holloway* and *Sullivan*, the Court relieved defendants of what may be the impossible burden of pinpointing the prejudicial effects of a non-event.

2. Although the *Sullivan* rule appears straightforward, its application has been inconsistent. Petitioner well describes the disagreement in the lower courts as to the precise content of *Sullivan*'s "adverse effect" standard. *See* Pet. Br. at 15-19. The critical point here is that in some courts, this confusion has resulted in a situation where the "adverse effect" standard is just as demanding as – or even more demanding than – the *Strickland* prejudice requirement. *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 799 n.6 (1987) (Blackmun, J. dissenting) ("The distinction between a prejudice showing and a showing of adverse effect on an attorney's performance apparently has been difficult for some courts to discern."); *Freund v. Butterworth*, 165 F.3d 839, 873-74 (11th Cir. 1999) (Tjoflat, J. dissenting) (discussing how easily an adverse effect analysis can become blurred with a prejudice analysis); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 206 (2002) ("[i]llustrating the difference between the level of proof" under *Sullivan* and *Strickland* is "difficult").

Properly applied, the adverse effect standard is met when a defendant demonstrates that a "reasonable" or "plausible" alternative strategy was available, and that "the alternative defense was inherently in conflict with *or* not undertaken due to the attorney's other loyalties or interests." *See, e.g.*,

Freund, 165 F.3d at 860 (requiring "reasonable" strategy) (citations omitted) (emphasis added); *United States v. Feyrer*, 333 F.3d 110, 116 (2d Cir. 2003) (requiring only "plausible" strategy). It is enough, in other words, for a defendant to make either of two showings – including a showing that a conflict of interest would have made it impossible for counsel to pursue a helpful strategy. *See, e.g., Rubin v. Gee,* 292 F.3d 396, 405 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 637 (2002) (finding adverse effect where "the alternative decision was effectively unavailable to [defendant's attorneys]"); *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) ("it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case") (citation omitted); *cf. Lombardo v. United States*, 222 F. Supp. 2d 1367, 1385 (S.D. Fla. 2002) ("petitioners must prove that the representations were 'inherently in conflict'"). As petitioner explains, that standard is easily met here, where counsel was precluded by his conflict of interest from pursuing the best strategy available to his client. In any court applying that standard, this case would have been decided differently.

Some courts, however, are applying different standards – either expressly or as a matter of practice – and are blurring the line between adverse effect and prejudice. That merging of the standards does not reflect any lowering of the *Strickland* bar, but rather a heightening of the *Sullivan* standard. In some circuit courts, for example, deference to trial strategy has substituted for meaningful application of the "adverse effect" standard. *See Skinner v. Duncan*, 2003 U.S. Dist. LEXIS 10102, at *168 (S.D.N.Y. June 17, 2003) (citing *United States v. Mays*, 77 F.3d 906, 909 (6th Cir. 1996) and *United States v. Kindle*, 925 F.2d 272, 275-76 (8th Cir. 1991)). Other courts have added their own gloss to *Sullivan* by presuming prejudice only where a conflict "*significantly* worsens," rather than simply "adversely affects," counsel's representation. *See United States v. Mett*, 65 F.3d 1531,

1535-36 (9th Cir. 1995) (emphasis added).

Perhaps most troubling, several courts have adopted a "proximate cause" requirement that may actually make it more difficult to demonstrate adverse effect than prejudice – a perverse result, and certainly not what this Court intended. In these courts, only one showing will suffice to make out adverse effect: the defendant must show that that it was counsel's conflict of interest that actually *caused* her to forgo the advantageous strategy, and not some other factor. *See, e.g., United States v. Burgos-Chaparro*, 309 F.3d 50, 53 (1st Cir. 2002), *cert. denied*, 123 S. Ct. 922 (2003) (claimant must show that an alternative "course would have been undertaken *but for* counsel's dual loyalty") (emphasis added); *Beets v. Collins*, 65 F.3d 1258, 1285 (5th Cir. 1995) (requiring "proximate cause"); *Mays*, 77 F.3d at 908 (a defendant must show "that the conflict caused the attorney to make bad choices for his client."); *Gray-Bey v. United States*, 156 F.3d 733, 740 (7th Cir. 1998) (a defendant must "demonstrate a rational, causal connection between an existing actual conflict of interest and an adverse effect in counsel's representation contrary to the defendant's interests"); *Freund*, 165 F.3d at 869 (imposing a "but for" requirement). *Compare Malpiedi*, 62 F.3d at 469 ("This is not a test that requires a defendant to show that . . . but for the conflict, counsel's conduct of the trial would have been different.").

But inquiring into why a conflicted defense counsel failed to take some action only adds another level of "unguided speculation," *Holloway*, 435 U.S. at 491, to the search for prejudice in conflict cases. Now a court must not only determine what strategy an unconflicted counsel hypothetically might have pursued, but also what hypothetical motivations counsel might have had for his decision – none of which will be readily apparent from the record. And requiring evidence of proximate cause imposes a nearly insuperable evidentiary burden on defendants. Some courts have

applied that requirement so aggressively, and demanded such direct evidence of motivation, that it seems the burden could be met only in the unlikely event of an admission from counsel that his strategic decisions were guided by conflicting loyalties – an admission that would subject him to disciplinary action and serious reputational harms. *See, e.g.*, *Burgos-Chaparro*, 309 F.3d at 53 (conceding that counsel's decision could have been influenced by conflict of interest, "but [defendant] offers nothing to show that it was so affected"); *Moss v. United States*, 323 F.3d 445, 469 (6th Cir. 2003) (no adverse effect where defendant "fail[ed] to provide any specific and credible evidence linking [counsel's] erroneous advice to the conflict of interest."). Indeed, the government pressed for just such a standard below, arguing that the "testimony of the trial counsel is critical to . . . a determination [of adverse effect]." Gov't C.A. Br. at 19. A defendant in a "proximate cause" court has the worst of all worlds: representation hampered by counsel's conflicting interests, coupled with an almost complete inability to demonstrate how that conflict manifested itself in counsel's decisions.

The difficulty that inheres in establishing adverse effect under this heightened standard is nowhere more obvious than in the case at bar. Under the standard articulated in most courts, petitioner could easily prevail by demonstrating that a plausible or reasonable alternative strategy was inherently in conflict with counsel's duties to his former client. Yet here, despite the fact that Schlie was ethically precluded from advancing the strategy most helpful to petitioner – pointing the finger at his former client, Swan – the Court of Appeals held that there had been no showing that counsel's conflict of interest "adversely affected" his performance. But when an attorney's "ethical dilemmas restrict[] the strategies that [he can] use in defending [his client], the conclusion seems inescapable that an 'actual conflict' of interest 'adversely affected' the [counsel's] performance in representing him." *Freund*, 165 F.3d at 881; *see also Holloway*, 435 U.S. at 490

("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."). If defendants are required to demonstrate more in order to establish adverse effect, then they are no better off under *Sullivan* than they are under *Strickland*.

The *Sullivan* standard has been criticized precisely because it has proved nearly impossible to satisfy in practice. *See, e.g.*, *Recent Cases*, 115 Harv. L. Rev. 938, 944 (2002) ("The [adverse effect] test is nearly impossible to satisfy, requiring a defendant not only to imagine alternate strategies or trial tactics that his lawyer failed to pursue, but also to connect that failure to the conflict."); *Leading Cases*, 116 Harv. L. Rev. 242, 243 (2002) ("an adverse effect is nearly impossible to prove and . . . the requirement does not comport well with the Court's other Sixth Amendment jurisprudence."); *Mickens v. Taylor*, 535 U.S. 162, 210 (2002) (Breyer, J. dissenting) ("even with extensive investigation in post-trial proceedings, it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel's decisions."); *Sullivan*, 446 U.S. at 355 (Marshall, J. concurring in part and dissenting in part) ("[The adverse effect] test is not only unduly harsh, but incurably speculative as well."). [6]

But the creation of a "nearly impossible" standard that does nothing to lessen a defendant's burden could not have

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[6] Others have argued that the limited presumption provided by *Sullivan* is of little use to defendants because those who are able to prove adverse effect are unlikely to have difficulty establishing prejudice as well. *See* Leading Cases, *supra*, at 249 (citing Tom Stacy & Kim Dayton, *Rethinking Harmless Error*, 88 Colum. L. Rev. 79, 109 (1988) (arguing that a presumption of prejudice after adverse effect is found does little to aid defendants; the real difficulty lies in proving adverse effect in light of "the discretionary and multifaceted nature of the judgments attorneys routinely make and the impossibility of assigning precise and unitary motives to these complex judgments")).

been what the *Sullivan* Court envisioned. The *Sullivan* standard was intended to serve as a "prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176. In order for *Sullivan* to provide meaningful protection to defendants burdened with conflicted counsel, the Court must clarify what that standard requires and reaffirm that it is intended to provide greater, not lesser, protection to defendants burdened with conflicted counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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